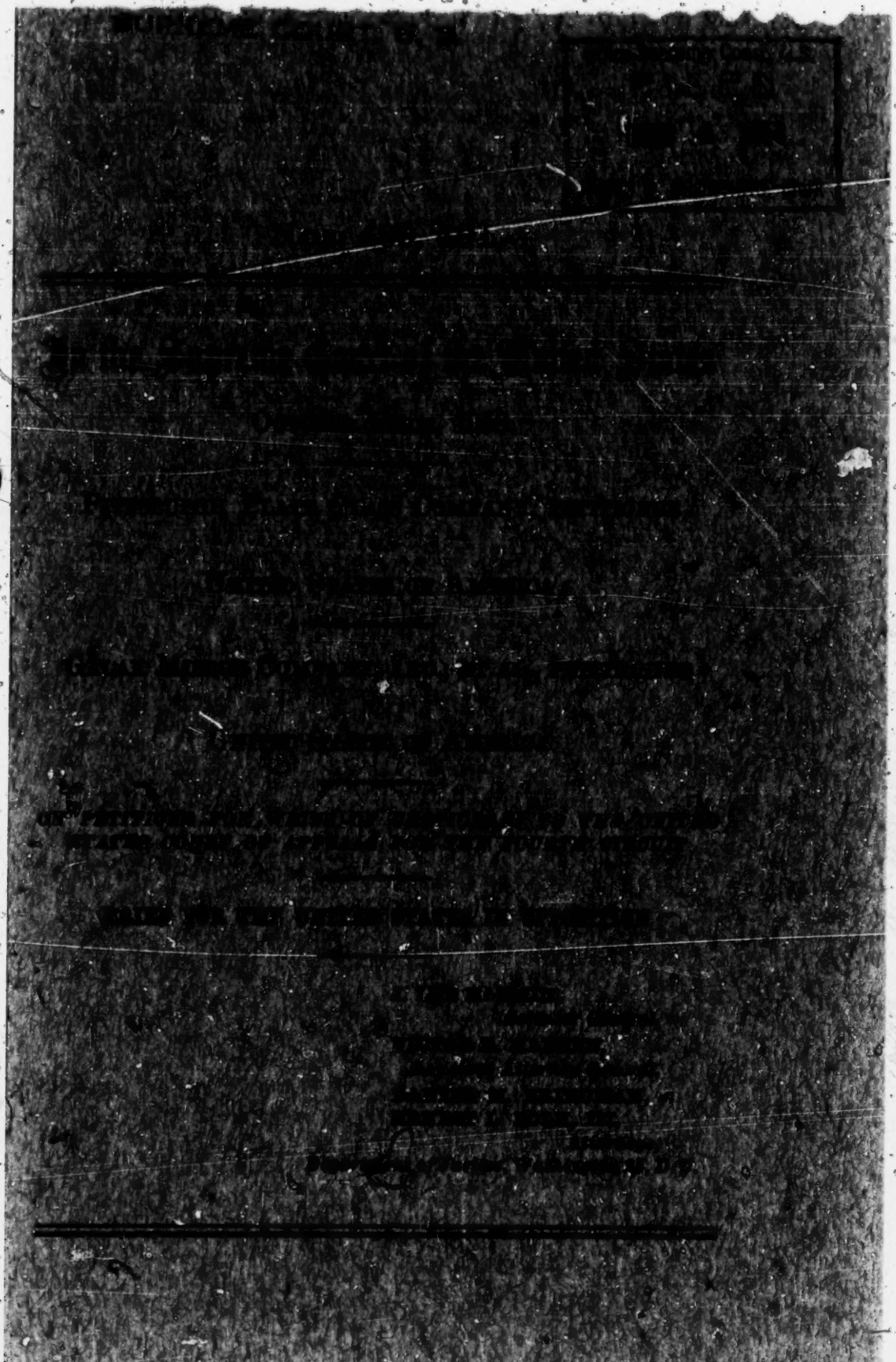

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 489

PITTSBURGH PLATE GLASS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 491

GALAX MIRROR COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. No. 489, pp. 1a–12a) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1958 (Pet. No. 489, p. 13a). The petition for a writ of certiorari in No. 489 was filed on

November 3, 1958, and in No. 491 on November 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that, in the circumstances of this case, the District Court had not abused its discretion in refusing to make available to the defendants, for use in cross-examination, the transcript of the grand jury testimony of one of the Government's witnesses.

2. Whether there was substantial evidence to support the jury's verdict that petitioner Pittsburgh Plate Glass Company was a party to the unlawful price-fixing conspiracy.

3. Whether the trial court correctly charged the jury that, although the indictment alleged a "continuing" conspiracy, the offense is established by proof that an illegal agreement had been entered into, without regard to how long it continued.

STATUTE AND RULE INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, commonly known as the Sherman Act, provides, in pertinent part, as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *

Rule 6 (e) of the Federal Rules of Criminal Procedure provides as follows:

> (e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT

On March 26, 1957, in the District Court for the Western District of Virginia, an indictment was returned charging seven corporate and three individual defendants with conspiring to fix prices of plain plate glass mirrors, in violation of Section 1 of the Sherman Act (App. 697 [1]). After trial, the jury convicted all

[1] "App." refers to the Appendix to Appellants' briefs, and "G. App." to the Appendix to the Government's brief, in the Court of Appeals.

of the corporate and two of the three individual defendants (App. 518),[2] and fines totalling $27,000 were imposed (App. 528–530, 723–724). The Court of Appeals for the Fourth Circuit unanimously affirmed.

1. THE INDUSTRY.

Petitioners (the only defendants who appealed their convictions) are three corporations—Pittsburgh Plate Glass Company ("PPG"), Galax Mirror Company, Inc. ("Galax"), and Mount Airy Mirror Company ("Mt. Airy")—and an individual, J. A. Messer, Sr., chairman of the board of directors of Galax and Mt. Airy. The corporate petitioners manufacture plain plate glass mirrors in Virginia and North Carolina, and sell them in interstate commerce to furniture manufacturers (App. 696–697; G. App. 11). PPG produces and sells mirrors at its warehouse at High Point, North Carolina, and elsewhere (App. 49); it also is one of the country's largest manufacturers of plate glass (App. 50), which it supplies to other mirror manufacturers, including those in Virginia and North Carolina (App. 49–50; see App. 695).

The prices of plain plate glass mirrors are determined by deducting a specified discount off the mirror manufacturer's basic list prices (see G. App. 62, 72), which are identical for the entire industry (App. 168–169). The smaller the percentage discount, the higher the price. Thus, lowering the discount from 80% to 78% off list would increase prices by 10%.

[2] One of the individual defendants was acquitted by the District Court at the close of the Government's case for want of sufficient evidence "to hold" him "individually" (App. 285, 301).

2. THE CONSPIRACY

The conspiracy was formed at two meetings on October 27 and 28, 1954, during the week of the Mirror Manufacturers Association's annual meeting at Asheville, North Carolina (App. 117, 612). Prior to that time, mirror manufacturers in Virginia and North Carolina "had just been through" a "drastic price war," during which prices "were awful cheap" (App. 196, G. App. 33; see also App. 236, 244, 278). By early October 1954, the demand for mirrors (which had previously been low, App. 35–36) was "picking up" (App. 309). At the same time, a shortage of plate glass seemed imminent (App. 330, 337–338; see App. 309, 340–341). At the Asheville meeting, members of the industry believed that, "in view of the shortage coming up," "now was the time" to raise prices and thus end the price war (App. 237).

a. *The Asheville Meeting.* All the petitioners either were present or were represented at the Asheville meeting (App. 119). PPG was represented by Gordon, its manager of plate glass sales, his assistant Ketchum, and two others (App. 119, 618). Four witnesses who attended the meeting testified that there were discussions as to the "need" and "desirability" (App. 172) of raising mirror prices (Buchan (App. 172–173, 175, 176); Robert Stroupe (App. 212–214); Weaver (G. App. 43; App. 335); Messer, Jr. (G. App. 32, 33)). Ketchum of PPG advised one manufacturer "to get your prices up or something" (App. 221), and proposals for price increases were brought to the attention of Gordon of PPG (App. 219–220, 220–221).

On Wednesday evening, October 27, 1954, Robert Stroupe (App. 217) and Buchan (App. 177) met with Kenneth Hearn (App. 237), the retiring vice-president of Virginia Mirror Company, who was "more or less acting as a missionary for the industry" (App. 236) since he "would like to see the mirror manufacturers get together on price" before he retired (G. App. 21; App. 236). Shortly after 10:00 P. M. (G. App. 73), Hearn telephoned Jonas, president of a large North Carolina mirror manufacturer (G. App. 24) which was not represented at the Asheville meeting (App. 231). Hearn, Stroupe, and Buchan all spoke to Jonas. During those conversations, Jonas was informed that "Mr. Messer was wanting to raise his prices, and everybody else there [at Asheville] was in agreement * * *" (App. 283).

Hearn told Jonas that "he wanted 'to see if it was possible for you fellows to get your prices raised,'" and that all "who were present at the meeting" at Asheville "were in favor of raising the prices" (App. 236). Hearn explained that if Jonas would agree to "come along, that would be all that there was to it" (App. 236), but that if he "didn't come along, prices wouldn't be raised" (App. 237). Hearn also reported that petitioner Messer was willing to raise his prices (App. 183, 179–180), but Jonas expressed disbelief (App. 180, 183, 219, 237) since Messer was well-known as a price cutter (App. 282).[3]

[3] Stroupe told Jonas (App. 218–219) that "[i]t looked like everything was going all right and now was the time to do it in view of the shortage coming up" (App. 237). Buchan "just kept on asking me [Jonas] if I would go along" with the price increase (App. 237).

According to Stroupe, Jonas' reaction to the proposal that he "come along" with the price increase was "very cold, and he wanted to know if I had talked to Mr. Gordon [of PPG]. I say me, he wanted to know if someone had talked to Mr. Gordon, and then asked to have Mr. Gordon call him, * * *" (App. 219).[4] Within "a few minutes," Gordon phoned Jonas (App. 238) and talked for fourteen minutes (G. App. 74), although Jonas said that he merely wanted to find out "if there was any truth in this matter * * *" (App. 237). Jonas told Gordon "what Mr. Hearn and Mr. Stroupe and Mr. Buchan had called me about," and Gordon admitted that "[i]n some of the rooms" he had "heard the fellows saying that they would like to get their prices increased" (App. 238). Although Jonas told Gordon that he "was not much in favor of raising my prices at the time" (App. 238), Gordon nevertheless indicated that Jonas "ought to be getting more for the product than we were getting for" it (App. 239). Jonas asked Gordon to have Hearn call him back (App. 239), and when Hearn did, Jonas stated that he would consider meeting with a group of mirror manufacturers to "go into this matter further" (App. 239; see also G. App. 75).

b. *The Bluffs Meeting.* The following day (October 28, 1954), Jonas met with Messer, Buchan, and Grady Stroupe at an inn called "The Bluffs" (App. 187–188, 226, 242) and "discussed the price situation"

[4] Stroupe testified that at that time he had already "talked with Mr. Gordon" (App. 219–220) "regarding prices" (App. 212).

(App. 195). Messer and Buchan had been previously attending the Asheville meeting (App. 616; G. App. 20). Jonas testified (App. 243–244) that there was

> a general feeling that there would be an increase of prices and it all hinged on me, if I would come along and the whole industry would, I mean our area would * * *. It looked like to me that if I didn't agree to raise my prices, the prices never would be raised. * * * After going over some of the back history of the way things had been going during the price war, I told them if they wanted to assure me they would stick by it, I would go ahead and raise my prices.

Although discussing various discounts (App. 195, 197, 227, 243, 244), "we just agreed that the 78 percent [off list] was a fair price and we would go along on that basis" (App. 244; see App. 198, 228). Jonas "took it for granted" that the 78 figure had already been discussed at Asheville,[5] since "they had already talked about the thing before they ever got hold of me" (App. 244).

Messer also insisted that "we all had to issue a letter" announcing the price increase (App. 202, 227, 245). Although he demanded that the letters go out "on the same day" (App. 196, 245), Grady Stroupe "thought of the appearances," namely, "that it would look like we had gotten together and fixed prices" (App. 228). Hence he thought it desirable that "anyone," although "not necessarily" he, should send out

[5] His assumption was correct. Robert Stroupe stated (App. 214; see App. 212) that at Asheville "They were in favor of the idea of raising prices to 78 percent."

a letter "a little later than the others" (App. 228). Jonas was willing to "just give in to" Messer since, having "agreed to raise my prices," "one day wouldn't make any difference" (App. 245–246; see App. 228–229).

c. *Events subsequent to the meetings.* Arrangements were made at the Bluffs meeting for notifying other mirror manufacturers of what had been decided. Jonas agreed to "report the outcome of the meeting to Pittsburgh Plate Glass Company" and two others (App. 246–247). On the following day (October 29, 1954), Jonas telephoned Prichard, who was Gordon's assistant, "told him about our gathering up on The Bluffs and what we agreed on the price * * *," reported Messer's insistence on the letter, and asked him to "convey my remarks to Mr. Gordon" (App. 249). In a subsequent telephone conversation on Monday, November 1, 1954, Prichard assured Jonas that he had reported to Gordon "[w]hat you told me," and Jonas therefore "felt the matter would be taken care of" (App. 249).[6]

On Friday, October 29, 1954, letters announcing a discount of 78% off the list price were sent out by petitioners Galax (App. 539; G. App. 29), Mt. Airy (G. App. 29, App. 550), and by four other manufacturers (App. 556, 531, 560, 250, 634). On Saturday, October 30, 1954, the same discount was announced by Stroupe's company (App. 576), and on Monday,

[6] Although Prichard attempted to deny that he had these conversations with Jonas (App. 306), the telephone bill of Jonas' company shows calls to Pittsburgh on the two dates on which Jonas testified he phoned Prichard (App. 631).

November 1, 1954 by PPG (App. 580–584). The 78% discount remained the "prevailing price" of both Galax and Mt. Airy for at least three months (G. App. 5, 6, 36–37), and PPG continued the 78% price at least until the summer of 1955 (App. 66–67, 105, 664–676).

3. THE DECISION OF THE COURT OF APPEALS

In unanimously affirming petitioners' convictions, the Court of Appeals, in a comprehensive opinion by Chief Judge Sobeloff, held *inter alia:*

a. That the evidence was sufficient to support the jury's verdict that PPG had been a party to the conspiracy (Pet. No. 489, 2a–5a). Applying the applicable rule that "in judging the sufficiency of the record to sustain the conviction" the evidence is to be "consider[ed] * * * in the light most favorable to the prosecution," the court ruled that PPG's "close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters" announcing the price increase "pursuant to an agreement with some or all of the conspirators" (*id.*, pp. 4a–5a).

b. That although the indictment alleged a "continuing" conspiracy, the jury was properly charged that continuation need not be proved, since "the agreement itself constituted the offense" (*id.*, p. 6a).

c. That the District Court had not erred in refusing to make available to the defendants, for use in cross-examination, the transcript of Jonas' grand jury testimony (*id.*, pp. 8a–12a). The court rejected petitioner's contention that, under *Jencks* v. *United*

States, 353 U. S. 657, they had a "right" to "the automatic delivery of grand jury transcripts" merely on a showing that the witness had stated that his grand jury testimony related to "the same general subject matter" as his trial testimony (*id.*, pp. 8a–9a, 12a). The court ruled (*id.*, pp. 9a–10a) that production of grand jury transcripts is governed neither by the *Jencks* decision nor by the subsequent so-called "*Jencks* statute" (18 U. S. C. 3500), but by Federal Rule of Criminal Procedure 6 (e), "which vests discretion in the trial court." It held (*id.*, p. 11a) that the trial court "did not exceed the proper limits" of its "sound discretion" in rejecting petitioners' demand, as a matter of right, for the transcript of Jonas' testimony.

ARGUMENT

1. Petitioners contend (No. 489, pp. 8–15; No. 491, pp. 7–13) that the trial court erred in refusing to permit them to examine, for use in cross-examining the Government's witness Jonas, the transcript of his grand jury testimony. The facts relating to the demand for Jonas' grand jury transcript are these: At the conclusion of his direct testimony, Jonas stated on cross-examination that he had testified before the grand jury, and that his testimony there was "on the same general subject matter" as his "testimony here at the trial" (App. 263). Counsel for PPG then "move[d] for the formal production of the Grand Jury transcript of this witness' testimony," and the court ruled: "The motion is denied" (App. 264). Petitioners made no attempt to question the witness

whether there were any inconsistencies between his trial and grand jury testimony; nor did they request the trial court itself to examine the grand jury transcript to determine whether there were inconsistencies. On the contrary, as counsel had stated in a prior colloquy with the court, petitioners' position was that under *Jencks* they had "a *right* * * * to inspect the Grand Jury record of the testimony of this witness after he has completed his direct examination" (App. 260, emphasis added).

In sustaining the ruling denying production, the Court of Appeals held that production of grand jury transcripts is not governed either by *Jencks* or by the subsequent "*Jencks* statute" (18 U. S. C. 3500), but by Federal Rule of Criminal Procedure 6 (e), "which vests discretion in the trial court" (Pet. No. 489, pp. 9a–10a); and that the trial court "did not exceed the proper limits" of its "sound discretion" (*id.*, p. 11a) by rejecting petitioners' "demand" for "the automatic delivery of grand jury transcripts" (*id.*, p. 12a) merely on the showing that the witness' "grand jury testimony related 'to the same general subject matter' as his testimony in court" (*id.*, p. 8a). We submit that this holding was correct, and that there is no occasion for further review by this Court.

a. In *Jencks*, this Court held that, without laying "a preliminary foundation of inconsistency" (353 U. S. at 666) between reports made by Government witnesses to the FBI and their trial testimony, and without prior examination of the reports by the trial judge (pp. 668–669), the defendants in a criminal case are entitled to inspect and use the reports in

cross-examining the witnesses. Petitioner PPG contends (Pet. No. 489, p. 9) that the "principles announced" in *Jencks* "would appear as fully applicable to grand jury transcripts as to F. B. I. reports." We believe, however, that this argument ignores the important public policy considerations which underlie the traditional secrecy of grand jury proceedings, and dictate against extending the *Jencks* rule to grand jury transcripts.

A chief reason for maintaining the secrecy of grand jury proceedings "is to encourage all witnesses to step forward and testify freely without fear of retaliation." *United States* v. *Procter & Gamble,* 356 U. S. 677, 682; *United States* v. *Rose,* 215 F. 2d 617, 628–629 (C. A. 3). This need for secrecy continues even after the grand jury has been discharged. For "[t]he grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Procter & Gamble* case, *supra.* It is for this reason that the "indispensable secrecy of grand jury proceedings" (*United States* v. *Johnson,* 319 U. S. 503, 513) "must not be broken except where there is a compelling necessity." *Procter & Gamble, supra.* In these circumstances, we submit that the Court of Appeals correctly held (Pet. No. 489, p. 9a) that "the production of grand jury testimony is not governed by *Jencks,*" and that the traditional secrecy governing such testimony "is not to be abandoned without clear legislative direction" (*id.,* p. 11a).

The "clear legislative direction" is that Congress intended that the *Jencks* case was not to effect any

change in the traditional rules which govern the production of grand jury transcripts. Three months after the *Jencks* decision, Congress enacted clarifying legislation (71 Stat. 595, 18 U. S. C. 3500) which, although confirming a criminal defendant's right to obtain any prior "statement" of a witness to an agent of the Federal Government relating to his trial testimony, provided for prior judicial inspection of the statement *in camera* to eliminate irrelevant portions before it is turned over to the defendant. The legislative history of this statute indisputably shows, however, that Congress "reject[ed]" "any interpretation of the Jencks decision which would provide for the production of * * * grand jury testimony." S. Rep. No. 981, 85th Cong., 1st Sess., p. 3. See also 103 Cong. Rec. 10922, 16113–14; *infra*, p. 15.

b. Contrary to petitioners' contention (Pet. No. 489, pp. 9–10; No. 491, pp. 7–8), the decision below is not in conflict with *United States* v. *Rosenberg*, 245 F. 2d 870 (C. A. 3). In *Rosenberg*, decided 23 days after *Jencks*, the Third Circuit in a one-paragraph *per curiam* opinion concluded that "the failure of the trial judge to permit counsel for the defendant to inspect at the trial the witness' grand jury testimony and statement to the F. B. I., as required by the rule announced in the *Jencks* case, compels us to grant a new trial" (p. 871).

At the outset, it should be noted that in *Rosenberg*, unlike this case, the trial judge had examined the statement and transcript, found and pointed out discrepancies between them and the witness' trial testi-

mony, "but counsel for the defendant was not permitted to inspect them himself" (*ibid.*). Moreover, a reversal would have been required in *Rosenberg* because of the F. B. I. statement even if no grand jury transcript had been involved there. In the light of these considerations, we doubt that *Rosenberg* can be uncritically accepted as a Third Circuit holding that under *Jencks* the defense would be entitled to the grand jury transcript in the quite different circumstances of this case (even assuming that *Jencks* were not modified by subsequent legislation).

In any event, in its consideration of the *Jencks* statute, Congress specifically criticized *Rosenberg* as one of the "misinterpretations and misunderstandings" of the *Jencks* decision by lower courts which called for clarifying legislation. S. Rep. 981, 85th Cong., 1st Sess., p. 3; see 103 Cong. Rec (daily ed.), p. A–7371. Since the enactment of the *Jencks* statute, all of the courts which have considered the question (including the court below) have held that the *Jencks* rule is not applicable to grand jury transcripts. *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2); *United States* v. *Angelet*, 255 F. 2d 383 (C. A. 2); *United States* v. *Consolidated Laundries Corp.*, 159 F. Supp. 860 (S. D. N. Y.). Thus, to the extent that *Rosenberg* suggests the contrary, it has been superseded by subsequent legislation. The gist of the *Rosenberg* decision was that the trial judge had erred, after his *in camera* inspection of the documents, in failing to permit defense counsel to see them. As the Third Circuit stated in *Rosenberg* (p. 871) "That practice * * * [was] definitely disapproved by the Supreme

Court" in *Jencks*. Now, however, in view of the new procedure prescribed by Congress in the *Jencks* statute, the *Rosenberg* decision is primarily only of academic interest. In these circumstances, even assuming *arguendo* that any conflict existed between the decision below and *Rosenberg*, we do not believe it is the kind of conflict which calls for resolution by this Court.

c. Since production of grand jury transcripts is not governed by the *Jencks* rule, the controlling standard is Federal Rule of Criminal Procedure 6 (e), which authorizes disclosure of "matters occurring before the grand jury * * * only when so directed by the court * * * in connection with a judicial proceeding." As the court below correctly held (Pet. No. 489, p. 10a), this rule "vests discretion in the trial court" to grant or withhold access to grand jury testimony. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233; *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, 507 (C. A. 2), certiorari denied, *sub nom. Rosenblum* v. *United States*, 352 U. S. 969; *United States* v. *Alper*, 156 F. 2d 222, 226 (C. A .2); *United States* v. *Byoir*, 147 F. 2d 336, 337 (C. A. 5); *United States* v. *Remington*, 191 F. 2d 246, 251 (C. A. 2). We submit that the Court of Appeals correctly concluded (Pet. No. 489, p. 11a) that the trial court did not "exceed the proper limits" of its "sound discretion" in denying petitioners' request for blanket production of the transcript of Jonas' grand jury testimony.

Petitioners demanded Jonas' grand jury transcript as of "right" (App. 260). They made no attempt to ascertain through cross-examination whether there

might be any inconsistencies between his trial and grand jury testimony, although they had opportunity to do so (App. 262–264). Nor did they request the trial judge himself to examine the grand jury transcript to determine whether there were any inconsistencies or whether, for reasons of public policy, there were portions of the transcript that should not be made public. Compare *Rosenberg, supra.* In these circumstances, petitioners' argument (Pet. No. 491, pp. 9–10) that the court below has formulated a different standard than the Court of Appeals for the Second Circuit for the screening of grand jury transcripts by trial courts is beside the point. For petitioners did not request any screening, and the holding below is only that the trial court did not here abuse its discretion in rejecting petitioners' blanket demand for the transcript of Jonas' testimony as of right. We submit that the Court of Appeals correctly refused to adopt the rule "contended for by the defendants here, requiring the automatic delivery of grand jury transcripts to defendants on demand" (Pet. No. 489, p. 12a).

2. Only petitioner PPG challenges the sufficiency of the evidence. It contends (Pet. No. 489, pp. 15, 18) that the case was submitted to the jury, and the latter convicted, "solely" on the basis of the fact that PPG sent out announcements of identical price changes substantially simultaneously with the other conspirators; and that under *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, such "conscious parallelism" is insufficient to establish participation in the conspiracy (*id.*, pp. 18–22).

But the jury was not instructed, as PPG alleges (Pet. No. 489, p. 16), that "from the sending of the price announcement by PPG it could infer knowledge, and that sending the announcement with knowledge was participation in the conspiracy." On the contrary, the court warned the jury that "the mere fact that the defendants sent out letters at or about the same time announcing identical price quotations [would not] constitute in itself a violation of law" (App. 469). The court pointed out that, although the evidence against PPG "largely revolves around" its price announcements (App. 474), PPG would "not be guilty" unless it "did these things or participated in these things with some understanding that" it "was acting in conjunction with the others" (App. 475; see also App. 482).

Furthermore, it is clear that PPG's conviction does not rest solely upon its sending out of the price increase announcements. As set forth in the Statement (*supra,* pp. 5–10), there is substantial additional evidence linking it to the various phases of the conspiracy. In brief, the evidence shows that PPG had representatives at the Asheville meeting at which the conspiracy was organized; that they were aware that the other mirror manufacturers were discussing raising prices and ending the price war, and participated in such discussions; that when Jonas was advised from Asheville that "everyone else there was in agreement" "to raise his prices" (App. 283), but that if he "didn't come along, prices wouldn't be raised" (App. 237), he insisted on discussing the matter with Gordon of PPG; and that Gordon, during his lengthy

telephone conversation with Jonas, stated that "in some of the rooms" he had "heard the fellows saying that they would like to get their prices increased" (App. 238), and that he thought that Jonas "ought to be getting more for the product than we were getting for" it (App. 239). The evidence further showed that, although PPG did not have a representative present at the Bluffs meeting, Jonas agreed to "report the outcome of the meeting to Pittsburgh Plate Glass Company" (App. 246–247); that the next day he telephoned Prichard, Gordon's assistant, "told him about our gathering up on The Bluffs and what we agreed on the price," reported Messer's insistence on the latter, and asked Prichard to "convey my remarks to Mr. Gordon" (App. 249); and that two business days later—the same day on which PPG sent out its price announcements—Prichard advised Jonas that he had done so (App. 249).

We submit that the Court of Appeals correctly held (Pet. No. 489, p. 5a), after carefully reviewing this evidence (*id.*, pp. 2a–4a), that it afforded a "substantial basis" for "permit[ting] the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators." The evidence fully satisfied the requirement that there merely need be "some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; see also *Glasser* v. *United States*, 315 U. S. 60, 80.

The decision below is not, as petitioner contends (*id.*, pp 7, 22), inconsistent with *Theatre Enterprises*,

Inc. v. *Paramount Film Distributing Corp.*, 346 U. S. 537. There the question was whether the trial court properly had submitted the question of conspiracy to the jury or whether, as plaintiff contended, the fact that each of the defendants had refused to grant it first run films required the court to direct a verdict in its favor. This Court, noting that it had "never held that proof of parallel business behavior conclusively establishes agreement" (p. 541), ruled that the trial court correctly "submit[ted] the issue of conspiracy to the jury". (p. 542). The question in *Theatre Enterprises*, therefore, was whether mere "parallel business behavior" was sufficient to overturn a jury verdict of no conspiracy. In the instant case, however, the jury found that PPG had participated in the conspiracy and, as we have shown, its verdict did not rest upon mere "parallel business behavior." Accordingly, there is no question here of "conscious parallelism" as a basis of establishing conspiracy, but only the usual issue in a criminal case of the sufficiency of the evidence to sustain the conviction. There is no occasion for further review of that factual question.

3. The Galax petitioners contend (Pet. No. 491, pp. 13–17) that the trial court improperly amended the indictment by rulings on evidence and by instructing the jury that, although the indictment alleged a "continuing" conspiracy, the Government was not required to show continuation in order to establish the offense. We submit that the Court of Appeals correctly rejected this contention.

The indictment alleged that the defendants, "beginning in or about October 1954 * * * and continuing thereafter," had engaged in a conspiracy to restrain trade, and that the conspiracy "consisted of a continuing agreement" to "stabilize and fix prices" of mirrors (App. 697). At the trial, the judge instructed the jury (App. 465, 471, 512, 516) that the gist of the offense charged by the indictment was "the act of conspiring, that is, in agreeing or joining together or acting together under a common understanding to fix or stabilize prices" (App. 465), and that if there was such an agreement, "then it does not matter whether they carried it out or not" (App. 516). The Court of Appeals, in correctly ruling that these instructions did not amend the indictment, stated (Pet. No. 489, p. 6a):

> [T]he indictment charges the single crime of conspiracy. The act of conspiring to violate the Sherman Act is an offense, and it is immaterial whether or not the purpose of the conspiracy was ever effectuated. *Nash* v. *United States*, 229 U. S. 373, 378 (1913), and *United States* v. *Trenton Potteries*, 273 U. S. 392, 402 (1927). Likewise, it need not be proved that the conspiracy continued for the duration charged in the indictment. *Cooper* v. *United States*, 91 F. 2d 195, 198 (5 Cir., 1937) * * * Since the agreement itself constituted the offense, the additional allegation in the indictment that the conspiracy was "continuing" did not set forth an essential element of the crime. Disregard of this "continuing" feature was immaterial.

Nor did the trial court err or prejudice petitioners by limiting the evidence to the period between

October 1954 (when the conspiracy was formed) and July 7, 1955.[7] As the Court of Appeals pointed out (Pet. No. 489, p. 7a), "[e]vidence for the period after July, 1955, was too remote to have significant bearing on the issue of the defendants' participation in the conspiracy in the fall of 1954." Although petitioners contend (Pet. No. 491, p. 17) that the trial court's ruling excluded "a considerable body" of "highly favorable" evidence "designed to rebut the charge of continuation" of the conspiracy (by showing "price fluctuations in the industry from 1954 up to March, 1957," Pet. No. 489, p. 7a), the fact is, as the court below pointed out (*ibid.*), that petitioners "did not even avail themselves of the full scope of the judge's ruling, which would have allowed such evidence for the period up to July, 1955. They elected to present a price fluctuation chart only for the month of November, 1954, the month immediately following the Asheville meeting and the announcements of price increases." Furthermore, as the court stated (*ibid.*), petitioners "in no way were misled, because they knew beyond question that the events of October, 1954, would be involved at the trial." In these circumstances, the court below correctly concluded

[7] As the Court of Appeals pointed out (Pet. No. 489, p. 7a), the trial court's limitation of evidence to July 7, 1955, the effective date of the statutory increase in Sherman Act penalties from $5,000 to $50,000 (69 Stat. 282), was "for the protection of the defendant, to avoid the possibility of a verdict based upon acts partly before and partly after the change in the penalty provision."

(*ibid.*) that petitioners "could not conceivably have been prejudiced" by the trial court's rulings.

The cases relied on by petitioners (Pet. No. 491, pp. 14–16) are clearly distinguishable. They involved either a physical change in the indictment, or an attempt to change by stipulation the facts alleged in the indictment, or a material change in the charging portion of the indictment. Thus, in *Ex parte Bain,* 121 U. S. 1, the District Court physically struck out a provision in the charging part of the indictment (*id.,* pp. 4–5), so that "the indictment on which [the accused] was tried was no indictment of a grand jury" (*id.,* p. 13). *United States* v. *Norris,* 281 U. S. 619, held that a conviction based on an indictment and a plea of *nolo contendere* could not be modified or set aside on the basis of a stipulation of facts "added to [the] indictment without the concurrence of the grand jury by which the bill was found" (p. 622), and "taken to be true and of record with like effect as if set forth in the indictment" (p. 621). In *Edgerton* v. *United States,* 143 F. 2d 697 (C. A. 9), the court held that a trial court's instructions deleting from an indictment charging use of the mails to defraud, "a material allegation of misrepresentation" so changed the indictment "that the jury may have rested its finding of guilt on a part of a charge different from that found in the indictment of the grand jury" (p. 699). None of these errors is present in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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